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ABSTRACT

Federal and state law provides, for the most part, little specific guidance to persons tape recording their own telephone calls for their own record-keeping purposes. In a specific case, a Pennsylvania newsman was prosecuted in 1972 on charges of wiretapping his own telephone conversations without notice to the other parties in the calls. A review of the cases applicable in Pennsylvania showed that the tape recording of one's own telephone communications may violate the privacy of the other party, but it is possible that "implied consent" or "fair use" legal precedents could be applied if judges and/or lawmakers choose. The general practice of unannounced telephone tape recording by police and fire departments as well as by newsmen and others as yet remains unexamined in the nation as a whole. The practice occurs many times without the knowledge of the telephoning public, but remains in the "grey area" of the law. (CH)

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"PRIVACY: THE REPORTER, THE TELEPHONE, AND THE TAPE RECORDER"

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The tape-recording of telephone conversations by newsmen is a very practical aspect of privacy law not dealt with in either of the leading mass communication law textbooks.[1] This omission deserves no censure and is hardly surprising, as reporters have not often run afoul of the law by this practice in the past and in some states are not likely to do so in the future.

The problem was brought into focus recently in a Pennsylvania case involving an investigative reporter for the Philadelphia Bulletin, Greg Walter, who was arrested in the spring of 1972 on wiretapping charges. Specifically, he was charged with tape-recording telephone conversations between himself and five other persons without their permission.

The case immediately assumed a political air, since Walter had earlier authored several articles unflattering to local public officials and was at the time of his arrest doing investigative reporting into alleged police corruption in Philadelphia. To complicate the matter, Walter was operating in the middle of a standing feud between Philadelphia District Attorney Arlan Spector on one hand and the Pennsylvania State Crime Commission and State Attorney General Shane Creamer on the other.

Putting these complications aside, the question that immediately comes to mind asks if wiretapping can reasonably be charged when a person

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[1] Harold L. Nelson and Dwight L. Teeter, Law of Mass Communications (Mineola, New York, 1969) and Donald M. Gillmor and Jerome A. Barron, Mass Communication Law (St.Paul, Minn., 1969).

records his own telephone conversation with another party. The Commonwealth of Pennsylvania has taken a hard line on privacy in earlier cases, as is illustrated in Commonwealth v. Murray, a 1966 Pennsylvania Supreme Court decision in which Mr. Justice Musmanno wrote,

> Section one of the Pennsylvania Constitution declares: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, posessing and protecting property and reputation, and of pursuing their own happiness." One of the pursuits of happiness is privacy. The right of privacy is as much property of the individual as the land to which he holds title and the clothing he wears on his back. (Emphasis added.)[2]

According to Musmanno, writing in the same case, "The General Assembly of 1957 outlawed wiretapping and all its trappings, results and effects, as completely as the Declaration of Independence wiped out monarchical tyranny in America."[3]

The assembly to which Mr. Musmanno refers is the Pennsylvania General Assembly which passed the statute Greg Walter was accused of violating. Pennsylvania jurists refer to the statute as the "Act of 1957," The first few sentences of the act define the violation:

> No person shall intercept a communication by telephone or telegraph without permission of the parties to such communication. No person shall install or employ any device for overhearing or recording communications passing through a telephone or telegraph line with intent to intercept a communication in violation of this act. No person shall divulge or use the contents or purport of a communication intercepted in violation of this act.[4]

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[2] 423 Pa.37; 223 A.2d 102.

[3] Ibid.

[4] The Act of July 16, 1957, P.L.956, Sect.1, 15 PS 2443.

In a recent decision, Pennsylvania Supreme Court Justice Roberts quoted from one of his own earlier opinions concerning the threat wiretapping poses to privacy:

> It is clear...that the privacy of the telephoning public is the interest which must first arrest one's attention in dealing with this problem. A mere passing acquaintance with the daily newspaper suffices to substantiate the existence of a widely felt and insidious threat to individual privacy posed, not only by technological advances, but also by the evolution of contemporary social structures. A jealous regard for individual privacy is a judicial tradition of distinguished origin.[5]

The legal encyclopedia American Jurisprudence, in its coverage of this topic, notes that wiretapping can be considered a tortious act. As such, it qualifies for inclusion in at least one of the four groupings that comprise the generally accepted law of privacy.

> There is ample authority to support the conculsion that conduct which amounts to "eavesdropping," as that term is defined for present purposes[6], may, under certain circumstances, constitute such an invasion of the victim's privacy that he can maintain a civil action against the eavesdropper. In this connection it has been pointed out that the tort of intrusion on a person's solitude or seclusion, one of the four forms of invasion sometimes listed as comprising the law of privacy, is not limited to physical invasions of the plaintiff's home or room, but extends to eavesdropping on private conversations... Eavesdropping by means of amplifying, transmitting, or recording devices, or a combination of such devices, has been the basis of several successful attempts to prove...invasion of privacy.[7]

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[5] Commonwealth v. McCoy, 275A.2d 31 (1971).

[6] "...the surreptitious overhearing, either directly by ear or by means of some mechanical device such as a wiretap, microphone, or amplifier, of the words of another spoken on a private occasion, or the preservation of such words by a tape recorder or similar recording device." See 11 ALR 3d 1296, sec. 1(a).

[7] 62 Am. Jur. 2d; the successful attempts are noted as McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 SE 2d 810 and Roach v. Harper, 143 W.Va. 869, 105 SE 2d 564.

But to return to the case at hand, Greg Walter was charged with intercepting a telephone conversation, a phrase that Ballentine's Law Dictionary defines as "a breach of privacy in listening without the consent of the communicants, whatever the method used to hear or record the conversation may be. Obtaining a telephone communication or message by wire-tapping device."

As has already been noted, Walter's case presents an intriguing legal point. There was no question of a "third party" tapping into a telephone line to listen clandestinely to the conversation of others. Rather, Walter was charged with recording ("intercepting") his own conversations with others. This raises the question of consent, and forces scrutiny of the concept of interception. Some jurists have noted that many ordinary business and household practices could be construed as violations of the broad Pennsylvania statute. The concept of "implied consent" has been suggested as a means of coping with this problem.[8]

In Parkhurst v. Kling,[9] Judge Kraft states specifically that

> ...neither law (Federal or Pennsylvania) was intended to prohibit one party to a telephone conversation from recording that conversation for his own purposes. The 'dirty business' sought to be terminated by the Pennsylvania statute was the interception and recording by third parties of communications without the consent of all the parties thereto. When recording by one of his conversation with another shall have become an

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[8] See David J. Pleva, "Recent Decisions," 5 Duquesne L.R. 448; U.S. v. Polakoff, 112 F.2d 888 (2d Cir. 1940).

[9] Alfred B. Parkhurst v. Vincent G. Kling, 266 F. Supp. 780 (1967)

> 'interception' of their conversation, the word 'intercept' shall have taken on a new and different meaning indeed. (all emphasis Kraft's)

This echoes Kraft's earlier opinion in a court hearing involving the Parkhurst case[10] in which he cited the precedent-setting federal case Rathbun v. United States[11] in announcing, "It is settled that no interception occurs when one party to a telephone conversation simply records it for his own use." (emphasis Kraft's)

The Supreme Court of Pennsylvania has taken the opposite position. In Commonwealth v. McCoy, Mr. Justice Roberts firmly states that

> Pennsylvania's anti-wiretapping statute clearly demands that the consent of all parties be given before any device for overhearing or recording is installed or utilized. The statute contains no exceptions even for interceptions by governmental authorities engaged in an attempt to apprehend a criminal.[12]

Mr. Justice Roberts then cites a brief paragraph in the Legislative Journal of 1957:

> When the Pennsylvania Act passed the State Senate, the prohibition read: 'No person shall intercept a communication by telephone or telegraph without permission of one of the parties.' (Senate Bill No. 97, Printer's No. 21, 1957) However, this restriction to the consent of only one party was then amended to provide for the consent of all parties to the communication before the interception could be defended.[13] (original emphasis)

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[10] Alfred B. Parkhurst v. Vincent G. Kling, 249 F.Supp. 315 (1965).

[11] 355 U.S. 107, /8 S.Ct. 161, 2 L.Ed.2d 134 (1957).

[12] Op.cit., p. 30.

[13] Commonwealth v. McCoy, op.cit., p. 31.

The Pennsylvania statute is strict in this regard. In contrast to the majority of other jurisdictions, which either have no anti-wiretapping statute or ones similar to the federal statutes which require only the consent of one of the parties, Pennsylvania's wiretapping statute demands that the consent of "the parties" to a communication be given before any device for overhearing or recording is installed or used.

Seven states follow the federal lead and require only one-party consent; seven other states require the consent of all parties to a telephone conversation. Eleven states have no wiretapping statute, and the remaining 25 states make no specification regarding consent. (See Table 1.)

Georgia and South Carolina have eavesdropper or "Peeping Tom" statutes without reference to electronic eavesdropping. Maine has a statute that prohibits molesting or destroying telephone or telegraph equipment, but no provision for electronic surveillance. Nevada's statute is unusual in that it requires two-party consent to intercept, but only one-party consent to disclose information. A complete listing of the wiretapping statutes of the fifty states was made by a U.S. Senate subcommittee in 1966.[14]

At the federal level, Section 605 of the Federal Communications Act of 1934 prohibits the interception and divulgence or publishing of "the existence, contents, substance, purport, effect, or meaning" of any wire or radio communication.[15] Section 605 was amended on June 19, 1968, by

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[14] U.S. Congress, Senate, Laws Relating to Wiretapping and Eavesdropping, for internal use by the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary, 89th Cong., 2d Sess., 1966.

[15] 48 Stat. 1103(1934), 47 U.S.C., sec. 605 (1958).

TABLE 1

WIRE TAPPING CONSENT REQUIREMENTS
OF THE FIFTY STATES

State	One Party Consent	Two Party Consent	Not Specified	No Law
Alabama			x	
Alaska	x			
Arizona			x	
Arkansas			x	
California		x		
Colorado			x	
Connecticut			x	
Delaware			x	
Florida	x			
Georgia				x
Hawaii		x		
Idaho			x	
Illinois		x		
Indiana				x
Iowa			x	
Kansas			x	
Kentucky			x	
Louisiana	x			
Maine				x
Maryland		x		
Massachusetts	x			
Michigan			x	
Minnesota				x
Mississippi				x
Missouri				x
Montana			x	
Nebraska			x	
Nevada		x		
New Hampshire				x
New Jersey			x	
New Mexico			x	
New York	x			
North Carolina	x			
North Dakota			x	
Ohio			x	
Oklahoma			x	
Oregon		x		
Pennsyivania		x		
Rhode Island			x	
South Carolina				x
South Dakota			x	
Tennessee	x			
Texas				x
Utah			x	
Vermont				x
Virginia			x	
Washington			x	
West Virginia				x
Wisconsin			x	
Wyoming			x	
Totals	7	7	25	11

Public Law 90-351, which states that:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.[16]

But it was the opinion of Judge Michael J. Conroy of the Philadelphia County Municipal Court in his denial of Walter's motion to quash the criminal complaint, that this does not in any way pre-empt the Pennsylvania statute. Judge Conroy noted that the federal guidelines are broader than the Pennsylvania statute, "So that even if we were to consider a pre-emption of the field, any state statute which must fall by pre-emption is one which is broader in scope than the Federal guidelines, since the Findings state that the purpose of the Federal legislation is to protect effectively the privacy of wire and oral communications."[17]

Counsel for the defense proposed that the act for which Walter was charged was not illegal at all, and relied on Senator Philip Hart's testimony during the debate before passage of the federal act to substantiate this claim:

> There are, of course, certain situations in which consensual electronic surveillance may be used for legitimate purposes by public officials and private persons...private persons may use it to preserve accurate records of their conversations

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[16] Public Law 90-351 is known as the Omnibus Crime Control and Safe Streets Act of 1968. Title III, chapter 119, section 2511 (2)(d).

[17] Commonwealth v. Gregory P. Walter, May Sessions 1972, No. 2816, Viol. P.S. 18-3742.

> in order to refresh their memory...Such legitimate uses of consensual electronic surveillance should not be prohibited.[18]

What Senator Hart appears to have been suggesting is an application of the concept of implied consent, a concept similar to the "fair use" doctrine one encounters in the enforcement of copyright law.[19] Recording telephone conversations in the interest of accuracy is a standard journalistic practice and through precedent might come to be considered an instance of implied consent or a "fair use" of a recording device.

It is a matter of public record that the Philadelphia police department records all incoming telephone calls on the emergency number as a standard practice. Similarly the Philadelphia fire department and other police and fire departments throughout Pennsylvania follow this practice. Regardless of whether a "beeper" is used, as required by Pennsylvania Utility Commission tariff,[20] persons calling these agencies are not asked to give their consent to the recording. It is undoubtedly true that prior to the disclosure of this practice in the Philadelphia Inquirer of May 29, 1972, the majority of callers did not realize they were being recorded, and this is possibly still the case.

FCC Tariff 263 requires the "beeper"--a device that produces a short tone signal every 15 seconds to alert the caller that a recording is being made--for all interstate calls. Individual states have local general tariffs to cover

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[18] U.S.Congress, Senate, 90th Cong., 2nd sess., volume no. 114, May 23, 1968, pp. 14694-14695.

[19] Nelson and Teeter, Law of Mass Communications, pp. 222-26.

[20] Local General Tariffs, Pennsylvania, Public Utilities Commission No.1, section 26, E.1.A.(1)(a), page 19.

intrastate calls. These tariffs do not have the force of law. In the event Bell Telephone discovers recording equipment being used without a beeper, the subscriber will be warned and will be told to have Bell install the proper equipment by a certain date. If this is not done, Bell has the option either to discontinue service or to notify law enforcement officials, who might then prosecute under state or federal anti-wiretapping laws.

A strict constructionist interpretation of the Act of 1957 does not allow special prerogatives for government agencies, though recording of emergency calls by police and fire departments might be interpreted as examples of implied consent or fair use.

Although it was not proven in the trial court, upon appeal, evidence of intentional discriminatory prosecution might invalidate the case against Greg Walter. Though it speaks to another case, in another state, the following U.S. Supreme Court opinion might be applied to Walter's case:

> The similarity of circumstances of the interception and divulgence by defendant and the Government in wiretapping operations are readily apparent. While the Government attempts to justify its wiretapping operations in the paramount interests of public safety...the statute in question contains no such exceptions.[21]

In his denial of Walter's motion to quash, however, Judge Conroy noted that the "non-prosecution of others alleged to be committing the same crime as the defendant does not constitute a deprivation of constitutional guarantees to this defendant."[22]

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[21] United States v. Robinson, 311 F. Supp. 1063 (1969). Robinson's prosecution was deemed invalid and his conviction overturned due to discriminatory prosecution.

[22] Commonwealth v. Walter, op.cit., p.7.

On September 19, 1972, Greg Walter was found guilty and fined $350. Municipal Court Judge Conroy denied a request by the prosecution to sentence Walter to a jail term of 15 days to a year. Walter has appealed the decision.

This relatively light fine--Walter faced a possible fine of $5,000--and the absence of a jail sentence, amounts to a mere knuckle-rapping for Walter. More significantly, the decision does little to clear the confusion surrounding this small corner of the law. Rather than a definitive, precedent-setting statement, the decision said in essence that Walter was wrong, but not very.

An interesting sidelight of Walter's conviction was speculation by the prosecution that the practice of recording incoming police and fire calls in Philadelphia might be stopped, at least until the statute was amended to permit it.

The law was not amended, but within a few days the police and fire departments announced that beepers would be installed on their emergency lines. Shortly thereafter, Philadelphia telephone subscribers received with their October telephone bill an enclosure reading:

PHILADELPHIA CUSTOMERS PLEASE NOTE
On all calls to
PHILADELPHIA POLICE
231-3131
A "beep" tone will indicate that the
conversations are being recorded by
the called party.
BELL OF PENNSYLVANIA

Implied consent presumably will now be assumed for all callers to this vital number, but what of the reporter?